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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: JAN 10 2006

EAC 04 014 51204

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be sustained and the petition will be approved.

We note that the record contains a Form G-28 Notice of Entry of Appearance as Attorney or Representative from attorney [redacted] of Reed Smith LLP. This form, however, indicates only that Mr. [redacted] represents the alien beneficiary, who is not an affected party in this proceeding. *See* 8 C.F.R. § 103.3(a)(1)(iii). We can find no comparable Form G-28 signed by an authorized official of the petitioning university. We will consider the arguments offered in Mr. [redacted] brief, because that brief was submitted as part of the petitioner's properly filed appeal, but we cannot consider Mr. [redacted] to be the attorney of record.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner, a public university, seeks to employ the beneficiary as an assistant professor. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the beneficiary qualifies for classification as a member of the professions holding an advanced degree but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the beneficiary qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its

report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Marcia Taylor, the petitioner's international faculty advisor, states: "The University has tested the labor market and found [the beneficiary] to be the best qualified applicant for the position." Professor Thomas F. Gallagher, chairman of the Department of Physics at the petitioning university, explains why the petitioner believes a national interest waiver to be in order:

> A key component of the Labor Certification process has already been satisfied in that a Search Committee was convened and a comprehensive, nationwide search undertaken to find the best qualified person for the position, and [the beneficiary] was selected from among other candidates to fill the position. . . . However, we are requesting an exemption from continuing with the Labor Certification application filing . . . as it is in the national interest to bypass the process. . . .
>
> Our request for this benefit is mainly due to significant delays at those two agencies, and it is not in the best interest of university students, nor in the best interest of scientific research and

> consequently, not in the national interest for us to continue with a Labor Certification application. . . .
>
> There is, unfortunately, a chronic shortage of American scientists, and in no scientific discipline is it more acute than in physics. . . . None of the top three candidates [for the position offered to the beneficiary] was a U.S. citizen. . . .
>
> In principle we could have chosen to hire a U.S. citizen for the position [the beneficiary] presently holds, for there were certainly applicants who were U.S. citizens. However, to have done so would not have been in the national interest. . . . After conducting an extensive search . . . we were convinced that [the beneficiary] was the best candidates.

We note that Department of Labor regulations at 20 C.F.R. § 656.21a(1)(iii) state that, if the application for labor certification involves a job offer as a college or university teacher, the employer does not need to establish that qualified United States workers are unavailable. Rather, the employer must only submit documentation to show clearly that the employer selected the alien for the job opportunity pursuant to a competitive recruitment and selection process, through which the alien was found to be more qualified than any of the United States workers who applied for the job. Pursuant to 20 C.F.R. § 656.21a(1)(iii)(E), applications for labor certifications following the above procedure must be filed within 18 months after a selection is made pursuant to a competitive recruitment and selection process. Because the beneficiary was selected more than 18 months ago, it is now too late for the petitioner to take advantage of the above provisions. It is not clear whether the emphasis on research (rather than teaching) would have made the beneficiary ineligible for these provisions, but this question is now moot.

Prof. Gallagher also describes the position and the beneficiary's role at the petitioning university:

> This position is a bridge position funded for the first five years by the Thomas Jefferson National Accelerator Facility (TJNAF) and the [petitioning university], and thereafter solely by [the petitioner]. . . .
>
> [The beneficiary] is leading a program to design and construct a new spectrometer for use at TJNAF. . . . [T]he resulting detector will be a crucial element in the research program of a national facility for the next decade.

[redacted] Hall A group leader at TJNAF and an adjunct professor at the petitioning university, states that the beneficiary's "training and research skills are unique and exceptional." Dr. [redacted] adds that the beneficiary has played "essential" or "leading" roles in various projects during his six years at TJNAF, first as a student, then as a postdoctoral researcher, and most recently as a member of the petitioner's faculty. Dr. de Jager concludes by stating that the beneficiary "is one of the top experts in nuclear spin physics. He is already well recognized in the scientific society."

Professor [redacted] supervised the beneficiary's doctoral studies at the Massachusetts Institute of Technology (MIT). Prof [redacted] describes various projects that the beneficiary has undertaken:

As a graduate student his first project was to construct the set of precision wire chambers he helped to prototype as an undergraduate for Jefferson lab. These wire chamber detectors, known as Vertical Drift Chambers (VDC), were designed to detect tracks of high energy particles such as electrons and protons within an accuracy of about 100 micro-meters. . . . This set of VDC were [sic] constructed at a cost of about half a Million Dollars and were to become the most crucial basic detectors in Experimental Hall A, one of the three major experimental areas at Jefferson lab. At this very early stage of his career as a young graduate student, [the beneficiary] played a leadership role in every aspect of this project. These detectors have been in continuous use since 1996, used by every major experiment in experimental Hall A, meeting or exceeding design goals for precision and stability. . . .

In 2001, only two years since he finished his PhD, he was offered a tenure-track faculty position at the [petitioning university]. Given the extremely high competition for tenure-track faculty positions at well-known universities, it is very rare for a young physicist to be offered such a position so quickly. Because of his contributions to the Hall A experimental program, and his potential as a future leader in its research program, Jefferson lab also offered him a position as a permanent staff scientist, in an attempt to keep him at the lab. However he accepted the [petitioner's] offer and has been an Assistant Professor at [the petitioning university] since the Fall of 2001.

As a faculty member [the beneficiary] has developed a vibrant research program in a very short time. He has been leading a program to instrument a new spectrometer for Hall A. . . . This new director is expected to increase the detector acceptance available in Hall A by a factor of 10. . . .

[The beneficiary] is also leading a group of physicists that attempts to study the spin properties neutron with high precision in an exciting kinematical region known as the *resonance region*. He is the spokesperson of the most recently completed Jefferson Lab experiment, E01-012. . . . The results from this experiment are eagerly awaited since they are expected to test a property known as the Quark-Hadron duality for the neutron spin properties. If this experiment shows that Quark-Hadron duality holds for the neutron spin, it will allow access to an exciting kinematical region that has never been accessible in any other experiment before, and will open up a new experimental program at Jefferson lab that will provide answers to some of the fundamental questions about the structure of the neutron and the proton.

The petitioner submits evidence to show that the beneficiary was one of several co-authors of numerous published articles. The petitioner also demonstrates six citations of the beneficiary's articles. Two of the citing articles were written or co-written by TJNAF researchers. Finally, the petitioner shows that the beneficiary is one of four 2003 grant recipients under the Department of Energy's Outstanding Junior Investigator Program.

The director denied the petition, stating that the circumstances described by Prof. [redacted] would appear to make the beneficiary a good candidate for labor certification. This assessment does not appear to take into account Prof. [redacted] assertion that qualified (albeit less qualified) U.S. citizens did apply for the position offered to the beneficiary.

The director concluded that the petitioner has not shown that the beneficiary's work is national in scope. Scientific research at major institutions is inherently national in scope, however, because the results are disseminated nationally (and internationally) through publications and conferences and because the findings of such research tend to apply universally rather than only locally. We therefore withdraw the director's finding that the petitioner's work lacks national scope.

The director also noted that the minimal citation history and the lack of independent witness letters accompanying the petition do not suggest that the beneficiary is "known outside the circle of his personal and professional acquaintances," or has had a significant impact on his field of research.

On appeal, Mr [redacted] asserts that the director erred by failing to issue a request for evidence as required by 8 C.F.R. § 103.2(b)(8). The most expedient remedy for this deficiency is to give full consideration, on appeal, to any additional information that the petitioner would have submitted had the director issued such a request.

Mr. [redacted] contends "the goal of immigration policy should be to ensure that research positions at [TJNAF] are filled by the most qualified candidates, not candidates who meet only the minimum qualifications for performing particle physics research." Nothing in the statute, regulations, or legislative history justifies the assertion that certain employers are, by virtue of their reputations, presumptively exempt from the job offer and labor certification requirements that Congress saw fit to incorporate into immigration law. We note that Congress created a blanket exemption for certain physicians at section 203(b)(2)(B)(ii) of the Act. This demonstrates that such blanket waivers are not implied by the more general language of the statute – otherwise, the clause relating to physicians would be redundant. It also shows that Congress is capable of singling out groups for blanket waivers, but to date Congress has not done so for scientific researchers at prestigious laboratories.

Furthermore, we note that the beneficiary is not employed by TJNAF; he is employed by a university that participates in a joint research consortium at that laboratory. Thus, Mr. [redacted] seems to imply that the exemption should apply to a broad number of universities that send researchers to TJNAF and, presumably, to other laboratories and research facilities of similar caliber. Whether or not immigration policy "should" reflect such provisions is a matter of subjective opinion. In terms of objective fact, the law contains no such sweeping provision. The waiver must rest on the merits of the individual alien, rather than on the assertion that the employer, or a collaborating facility, occupies some rarefied stratum above the reach of labor certification.

The petitioner asserts on appeal that the beneficiary's "articles have been cited approximately 1000 times." A printout from a citation database shows that 27 of the beneficiary's articles have been cited a total of 727 times, indicating that the "approximately 1000" figure is somewhat exaggerated. Four of the articles have

each been cited over 40 times; two of those articles have been cited over 100 times each. This very impressive number of citations is tempered somewhat by the fact that the beneficiary was among dozens of co-authors on many of these papers, and by the petitioner's failure to establish how many of these citations were self-citations by the petitioner or his numerous collaborators. Still, this volume of citations is highly significant. The director can hardly be faulted for failing to consider this information, considering that the petitioner documented only six citations in the initial filing; nevertheless, the director ought to have issued a request for evidence in order to give the petitioner an opportunity to provide this evidence prior to the denial.

The petitioner submits several new witness letters on appeal. While the new witnesses are from several different countries, all of them have performed research at TJNAF. Professo[redacted] of Tel Aviv University contends that several of the beneficiary's career milestones, such as his Outstanding Junior Investigator grant and his faculty appointment at the petitioning university after only two years of postdoctoral work, are, themselves, evidence of the beneficiary's standing in the field. Prof. Piasetzky stresses the beneficiary's leadership role in the construction of vital detection equipment at TJNAF. These factors have not escaped our notice.

Dr.[redacted] of the University of Glasgow states that the beneficiary "has distinguished himself as a 'leading light' of the TJNAF Hall-A collaboration, which consists of about [one] hundred nuclear physicists . . . [who] are themselves considered world leaders in the field." Dr.[redacted] director of research at the Particle Physics Laboratory at Université Blaise Pascal, states that the beneficiary's "work was pivotal for arriving at most of the very exciting results co-published by him and his Hall-A colleagues."

Dr.[redacted] associate director for physics at TJNAF, credits the beneficiary with "important contributions" "that have attracted much attention from physicists throughout the world." Dr.[redacted] states that the beneficiary "is one of the leading researchers in the Jefferson lab experimental Hall A collaboration," and "is also leading a new experimental initiative to understand the physical origins of an effect that modifies the properties of the proton when it is embedded in a nucleus. This problem has puzzled particle and nuclear physicists alike for more than two decades now."

While it is true that the witnesses of record have worked with the petitioner at TJNAF, we cannot ignore the nature of that facility. Unlike respected universities, which number in the thousands, there exist only a limited number of major particle accelerator laboratories. As a result, such facilities necessarily attract researchers from around the world and become important crucibles of international collaboration. On the one hand, working at a particle accelerator laboratory is not *prima facie* grounds for a waiver. The fact that researchers from other countries are familiar with the beneficiary's work is not surprising, because given the international nature of TJNAF's research collaborations, interaction with international researchers is virtually inevitable.

On the other hand, the record demonstrates that many of the researchers at TJNAF are acknowledged leaders in the discipline of particle physics. In such a setting, many of these elite researchers will be difficult to impress. Those researchers who do distinguish themselves even among their august collaborators are likely to have a substantial impact in the international research community. The witnesses of record do not write only

of the beneficiary's "promise" or "potential," nor do they refer vaguely to "contributions" without elaboration.

The extremely high citation rate of some of the published articles demonstrates the impact of the work undertaken by the Hall A collaboration. Key participants in the Hall A collaboration credibly state that the beneficiary is a leader within that collaboration. The beneficiary not only participates in this major research effort, but successfully stands out within the group. This indicates that the beneficiary will continue to make especially valuable contributions during his remaining years at TJNAF, as well as at the petitioner's own Physics Department.

It does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given field of research, or the reputation of the prospective employer, rather than on the merits of the individual alien. That being said, the evidence in the record establishes the significance of this beneficiary's work rather than simply the general area of research. The benefit of retaining this alien's services outweighs the national interest that is inherent in the labor certification process. Therefore, on the basis of the evidence submitted, the petitioner has established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has sustained that burden. Accordingly, the decision of the director denying the petition will be withdrawn and the petition will be approved.

ORDER: The appeal is sustained and the petition is approved.